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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1942.

No. **193**

PHILLIPS-BUTTORFF MANUFACTURING COMPANY,
PETITIONER,

VS.

WILLIAM JOHNSON, RESPONDENT.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE, AND
BRIEF IN SUPPORT THEREOF.**

CECIL SIMS,
Nashville, Tennessee,
Attorney for Petitioner.

BASS, BERRY & SIMS,
Of Counsel.

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May It Please the Court:

The petitioner, Phillips-Buttorff Manufacturing Company, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Respondent William Johnson, a nightwatchman formerly in the employ of petitioner Phillips-Buttorff Manufacturing Company, brought this suit in the Chancery Court of Davidson County, Tennessee, to recover for certain overtime payments alleged to be due him under the

Fair Labor Standards Act, 29 U. S. C. A., Sec. 201 *et seq.* The case was tried on a stipulation of facts. The Chancellor granted a recovery and the cause was appealed to the Supreme Court of Tennessee. The Supreme Court of Tennessee, in an opinion for publication filed April 4, 1942, affirmed the judgment. The stipulated facts are in substance as follows:

Petitioner owned and operated a large retail store in a six-story building on Third Avenue North in Nashville, Tennessee, which also contained the executive offices on the second floor, and a tin shop.

Petitioner also owned two other buildings, one of which was on Second Avenue North and the other on First Avenue North, in Nashville, Tennessee. The Second Avenue building was used as a warehouse, and some manufacturing was done in this building. The First Avenue building was a warehouse.

The petitioner had a foundry and warehouse in another part of the city, more than a mile distant from the above named buildings.

The large six-story building on Third Avenue was purely a retail store and there is no provision in the stipulation with respect to any interstate commerce being conducted in this building, even in the day time.

Sixty-five percent of all of the business transacted at the other two buildings was stipulated to be wholly *intrastate* business.

Respondent was a night watchman at the retail store. He commenced working at five p. m. and worked until six a. m. the following morning. He covered each of the six floors of the retail store once each hour. Twice each night he was required to leave the retail store and visit the buildings on Second Avenue and First Avenue, the first trip being about 7:30 p. m., and the other trip being about 2:30 a. m. The total time required to visit both of these buildings was thirty minutes, so that on each visit respondent was away from the retail store for a period of thirty minutes. Except for these two visits to

the other buildings respondent remained continuously at the retail store except for a few additional trips to the other buildings on sporadic occasions of a non-recurring type. He had nothing whatever to do with the foundry and had no duties with respect thereto.

Under the stipulation the respondent devoted more than ninety percent of his time to the retail store and less than ten percent of his time to the buildings on First and Second Avenues, where sixty five percent of the goods stored or manufactured was sold wholly within the State of Tennessee. Respondent was away from the retail store only one hour out of the total thirteen hours of service and this one hour was devoted to buildings stipulated to be primarily engaged in intrastate business. Dividing the time devoted to the two outside buildings on a pro rata basis, it results that thirty-nine minutes of this one hour were devoted to intrastate commerce and only twenty-one minutes of the hour were applicable to interstate commerce. Respondent worked only in the night time, and hence no activities of any kind were going on during his employment. Thus respondent devoted twelve out of his thirteen hours to the retail store which, in the absence of stipulation or proof to the contrary (the burden of proof being on respondent), must be deemed to have been engaged during the day time in the ordinary activities of a retail store, to-wit, the sale of merchandise to customers on the premises, and by actual computation less than three percent of his time had even the slightest connection with interstate commerce. This connection consisted of visiting two buildings during the night time, where no work of any kind was in progress and no commerce of any type was being transacted, and which even in the day time were predominantly intrastate in character.

The Supreme Court of Tennessee was of the opinion that respondent was covered by the provisions of the Fair Labor Standards Acts because his activities relating to interstate commerce, while admittedly slight, were ren-

dered each night, and further because the two outside buildings were but a block distant from the retail store and he was subject to call and could readily go to these buildings if an unusual occurrence made his presence necessary.

Petitioner insists that respondent's relation to the production of goods for commerce or to commerce within the meaning of the Fair Labor Standards Act is so tenuous and insubstantial that respondent's occupation does not fall within the protection of the Act, as construed and applied by the Supreme Court of the United States in *A. B. Kirschbaum Co. v. Walling* (No. 910) and *Arsenal Building Corp. v. Walling* (No. 924), October Term, 1941.

REASONS RELIED UPON FOR THE ISSUANCE OF THE WRIT.

1. The decision of the Supreme Court of Tennessee in the present case involves an important Federal question of substance not heretofore determined by the Supreme Court of the United States.

2. The decision of the Supreme Court of Tennessee in the present case is untenable and is probably not in accord with the applicable decisions of the Supreme Court of the United States and particularly the recent decisions of this Court in *Kirschbaum Co. v. Walling* (No. 910) and *Arsenal Building Corp. v. Walling* (No. 924), October Term, 1941.

Petitioner annexes hereto and presents herewith as a part of this petition a certified copy of the transcript of the record in the case, including the proceedings in the Supreme Court of Tennessee, specification of error, and brief and argument, giving in a more amplified form the reasons why the decision and judgment of the Supreme Court of Tennessee was erroneous and should be reversed,

and respectfully asks that the certified transcript of the record, the specification of error, and brief and argument be considered in connection with and as a part of this petition for the purpose of testing the correctness of the ruling of the Supreme Court of Tennessee.

PRAYER FOR WRIT.

Wherefore your petitioner, Phillips-Buttorff Manufacturing Company, respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Tennessee, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case on its docket as No. 13, styled William Johnson vs. Phillips-Buttorff Manufacturing Company, Davidson Equity, and that said judgment of said Supreme Court of Tennessee may be reversed by this Honorable Court, and that your petitioner may have all other and further relief in the premises as the Honorable Court may deem meet and just; and your petitioner will ever pray.

Phillips-Buttorff Manufacturing Company,
By CECIL SIMS,

Attorney for Petitioner.

BASS, BERRY & SIMS,
Of Counsel.